

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After having reviewed the entire evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant met with personal injury by accident arising out of and in the course of his employment with respondent on February 8, 1995, while attempting to climb through an access port into a grain storage bin. While maneuvering his way into the grain storage bin, claimant experienced pain in his low back, which later extended down to claimant's left leg and into his foot. Claimant was treated by a series of doctors and was ultimately referred to Dr. Stephen Ozanne who began treating claimant on April 14, 1995. Dr. Ozanne prescribed physical therapy, a TENS unit, and epidural steroid injections with no significant relief throughout the treatment process. A July 1995 MRI indicated degenerative changes and spondylolysis at L5-S1. Claimant was provided a functional impairment rating and work restrictions by Dr. Ozanne, Dr. C. Reiff Brown, and Dr. Daniel D. Zimmerman. The findings by Dr. Brown and Dr. Ozanne are well set forth in the findings of fact of the Administrative Law Judge and will not be repeated herein. It was acknowledged by the parties that respondent did not offer to return claimant to work within the restrictions set forth by Dr. Ozanne and, therefore, a work disability under K.S.A. 44-510e would be appropriate. K.S.A. 44-510e states in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.

The Administrative Law Judge found a task loss of 82 percent based upon the opinion of Dr. Zimmerman. Respondent contests this finding, alleging Dr. Zimmerman's opinion, which followed Jerry Hardin's task list, was based upon inaccurate information provided by claimant. However, respondent does not provide a separate opinion upon which a task loss can be computed. While there is some concern regarding Dr. Zimmerman's opinion, his testimony, the testimony of Mr. Hardin and the testimony of the claimant support the 82 percent task loss as was awarded by the Administrative Law Judge. The Appeals Board finds this evidence to be credible and persuasive and affirms that portion of the Award.

Respondent also takes exception to the Administrative Law Judge's Award of a 100 percent wage loss, citing Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 170, (1997). The Kansas Court of Appeals in Copeland, in attempting to harmonize K.S.A. 44-510e with the principles of Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995), found that a fact finder must first decide

whether a claimant made a good faith effort to find appropriate employment. If a finding is made that a good faith effort has not been made to find appropriate employment, then the fact finder is obligated to determine an appropriate post-injury wage based upon all of the evidence before it, when computing claimant's work disability. In this instance, it is uncontradicted that claimant has not looked for employment since his accident. He acknowledged at the time of regular hearing that he had made no job search and had contacted no prospective employers. The Appeals Board finds claimant in violation of the policies in Copeland and an appropriate post-injury wage will be determined.

As respondent was unable and unwilling to offer claimant an accommodated job the Appeals Board cannot use the wages paid by respondent as a basis for computing the wage loss. In addition, Jerry Hardin, the only vocational expert to testify in this matter provided no indication as to claimant's ability to earn wages, finding claimant suffered a 100 percent wage loss due simply to the fact he was not employed at the time of the evaluation. The Appeals Board in considering the evidence finds claimant capable of earning minimum wage at \$5.15 per hour and working a 40-hour week. While he does have restrictions from the doctors, none of those restrictions prevents him from working 40 hours per week and there are a multitude of minimum wage jobs which claimant would be able to secure within the restrictions of either Dr. Brown or Dr. Ozanne. This results in a 47 percent loss of wages under K.S.A. 44-510e.

As K.S.A. 44-510e requires both the task loss and the wage loss be considered and given equal weight when computing work disability, the Appeals Board in averaging the 82 percent task loss and the 47 percent wage loss finds claimant has suffered a 64.5 percent permanent partial disability as a result of the injuries suffered with respondent on February 8, 1995.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Bruce E. Moore dated May 30, 1997, should be, and is hereby, modified. An award is granted in favor of the claimant, Herminio Acosta, and against the respondent, Collingwood Grain, Inc. and its insurance carrier, Old Republic Insurance, for injury occurring on February 8, 1995, for a 64.5% permanent partial disability to the body as a whole.

Claimant is entitled to 27 weeks temporary total disability compensation at the rate of \$258.83 per week in the amount of \$6,988.41, followed by 259.94 weeks permanent partial disability compensation at the rate of \$258.83 in the sum of \$67,280.27 making a total award of \$74,268.68.

As of May 11, 1998, there would be due and owing to claimant 27 weeks temporary total disability compensation at the rate of 258.83 in the sum of \$6,988.41 followed by 142.71 weeks permanent partial disability compensation at the rate of \$258.83 per week

in the amount of \$36,937.63 for a total due and owing of \$43,926.04 which is ordered paid in one lump sum minus amounts previously paid. Thereafter, claimant is entitled to 117.23 weeks permanent partial disability compensation at the rate of \$258.83 in the sum of \$30,342.64 until fully paid or until further order of the Director.

Claimant is entitled to medical expenses, unauthorized medical and future medical per the award.

Claimant's attorney fee contract is approved insofar as it is not in contravention to K.S.A. 44-536.

The fees necessary to defray the expense of the administration of the workers compensation act are hereby assessed against the respondent to be paid as follows:

BARBER & ASSOCIATES

Deposition of Jerry Hardin	\$211.80
DATED December 12, 1996	

HOSTETLER & ASSOCIATES, INC.

Deposition of Dr. Daniel Zimmerman	\$233.90
Dated December 19, 1996	

OWENS, BRAKE, COWAN & ASSOCIATES

Regular Hearing Transcript	\$228.10
Dated March 12, 1997	

UNDERWOOD & SHANE

Deposition of Dr. C. Reiff Brown	\$240.00
Dated April 21, 1997	

Deposition of Edward Dwyer	\$ 63.00
Dated April 22, 1997	

Deposition of Kenneth Summers	\$199.50
Dated April 22, 1997	

Total	\$502.50
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IT IS SO ORDERED.

Dated this ____ day of May 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Gary E. Patterson, Wichita, KS
James M. McVay, Great Bend, KS
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director